



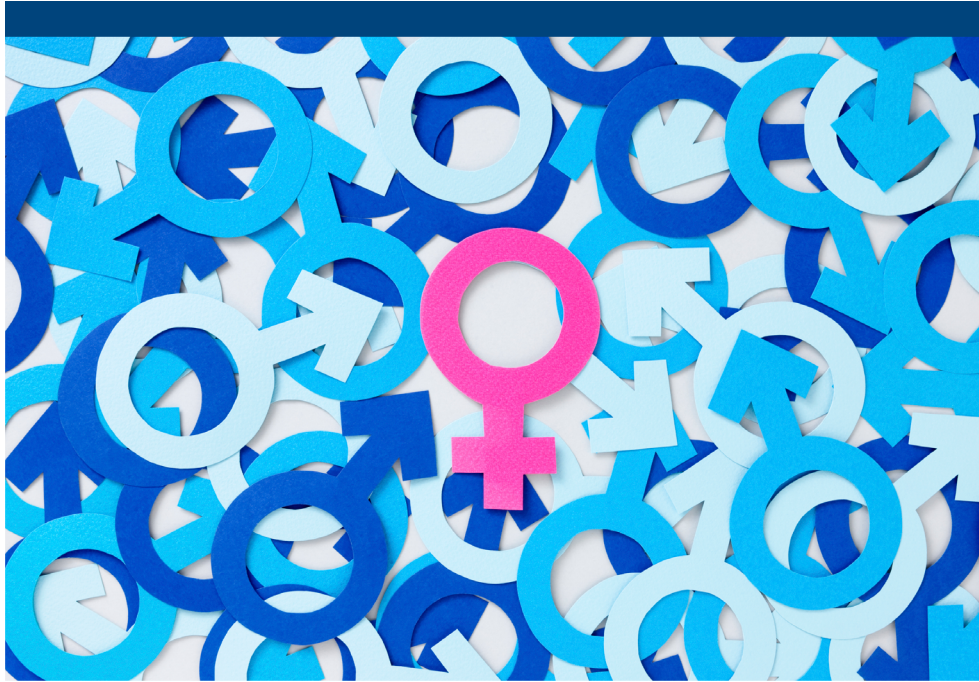
The Jury

February 2015
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EXPERT

The Art and Science of Litigation Advocacy

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NOTE FROM THE EDITOR

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Legal Decision-making**

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NOTE FROM THE EDITOR

Breaking Rules, Practice Tips, and Racial Biases in Legal Decision-making

DESPITE THE SNOWSTORMS up and down the East Coast and wintry weather in parts of the country not used to cold temperatures, spring is around the corner for all of us. This issue of *The Jury Expert* is filled with information to keep you occupied when you have a few minutes to read.

We have new Road Warrior Tips for you to make travel easier and more pleasant but we also have multiple offerings to help you sort out things like what keeps (the other side) from settling lawsuits, figuring out how to help your jury deliberate fully, questions about who your ideal juror might be, and information on the best ways to apologize in the courtroom.

You also get to see what your fellow readers sought out the most in *The Jury Expert* pages in 2014. Find out if you missed something that everyone else has read. Don't be left behind. And if you have trouble knowing when to use affect or effect—you'll love our new favorite thing.

Finally, we are breaking one of our rules here at *The Jury Expert* and publishing a re-print because it's such an important topic we want everyone to have access to it! Take a look at Sommers and Marotta's article on how racial biases play into legal decision-making. This is an article written in plain language that speaks to both conscious and unconscious racial biases and how they interact to result in legal decisions that are not just. Read it.

As always, if you have suggestions, thoughts, requests, or comments, please let me know by clicking on my name below. Thanks!

Rita R. Handrich, Ph.D.
Editor, *The Jury Expert*

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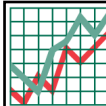
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Why Women Stay Quiet at Work, but Not in the Jury Room

by Suann Ingle, MS.

DO WOMEN FAIL TO SPEAK UP, or do men just fail to listen? In the recent *New York Times Sunday Review/Women at Work* section piece entitled [Speaking While Female – Sheryl Sandberg and Adam Grant on Why Women Stay Quiet at Work](#),” the authors posit that women stay quiet at work because men’s voices are more powerful. It struck me that gender has become an easy target. While quite true in many corporate conference rooms, the same is not true in jury deliberations. Gender, while important, is not determinative of the decisions that are made by juries at trial.

Full disclosure, my business partner and I are both first born children, both of us derive a strong sense of purpose from our work, both of us have cleared our own paths. And both of us had strong mentors (in addition to our parents): mine a proven force in the advertising world of Coca-Cola media-buying on Madison Avenue and Nancy’s a war-veteran fly-boy turned successful trial attorney in BigLaw. Both gave little consideration to our genders as they offered advice, direction, support, example and confidence.

We are both trained to understand and to analyze the conse-

quences of making our voice heard and the benefits of doing so. Put simply, or at least in the language of Sandberg’s best-seller “[Lean In: Women, Work and the Will to Lead](#),” we feel as if we grew up already leaning in. It is disappointing that the current dialog about gender bias in the workplace is still a “thing” about which to “cuss and discuss.” More disappointing is that it is clearly still a “thing” at all. One just has to read the [comments section](#) of the NYT January 12 op-ed for evidence of this.

I think these factors of birth order and experience are just a few of the factors that may matter more than gender when considering a decision to speak up in a mixed gender group discussing important issues. And, it is in this context that multiple assumptions presented within the *New York Times* piece are considered and questioned, in order to both contrast and appreciate the dynamics playing out in the hundreds of deliberation groups I have observed.

Be Aware of How to Talk to Women

The advocate who knows how to talk to women has an advan-

tage. Or, as one long time jury consultant told me, “I think that women talk when they understand (and the group understands) the importance of all voices being heard. And, if the attorney presentations help the jurors understand the case, regardless of how esoteric or technical the issues presented, women and men both talk.” Trial lawyers who use part of their closing statements to emphasize the importance of good deliberation meaning that every voice is heard, help create a safe environment in the jury room.

When the trial attorney takes the time to educate jurors on deliberation, the jurors, often women, may decide that debate isn't a sport for them. They would rather spend their time in deliberations to listen, evaluate and then speak with intention, without a need to speak for speaking sake or for power. In the jury room, women have the same power to vote as do male jurors, and if taking the oath to serve seriously, those women will exercise that vote regardless of the male personalities in the jury room. When women jurors have been empowered by trial lawyer education on the importance of every voice being heard—whether they are right or wrong about your case, the jury room is one place women often won't back down, perhaps because they feel heard and equally important.

Be Aware of Cultural and Societal Factors

We live in a culture of interruption. There is so much noise with which to compete in order to be heard. What if silence on the part of any one individual in a group had nothing to do with gender? Further, there are a multitude of considerations when evaluating whether a person will speak up in a group setting. The following list is not all inclusive of the factors involved in individual decisions to keep silent in the workplace or the jury deliberation room (and each bears consideration when advising and aiding trial attorneys to present to persuade):

- age
- ethnicity
- geographic origin
- education level
- sexuality
- gender identity
- marital status
- mood – state of mind
- weight
- attire
- energy level
- pain level
- status of sleep health
- level of social interaction
- religious affiliation
- past experiences

- lifestyle activity level
- financial health
- level of presence, engagement
- level of job security (entrepreneur/employee/manager)
- extrovert/introvert
- culture of interruption
- generational identity
- self perceived power
- career

All these factors, individually and in combination, can contribute to either full participation or silence on the part of any individual group or jury member. And if we go back to the idea of gender and silence, the “Obama-style meetings” mentioned in the NYT piece as a solution to the problem of women and silence, are impossible to evaluate. Here is what Sandberg and Grant said:

“As 2015 starts, we wonder what would happen if we all held Obama-style meetings, offering women the floor whenever possible. Doing this for even a day or two might be a powerful bias interrupter, demonstrating to our teams and colleagues that speaking while female is still quite difficult.”

However, even President Obama does not apply the standards of the “Obama-style meetings” consistently. For example, on one particular day he called only on female reporters. That is not the answer to encourage a proper level of participation in any group. “Offering women the floor whenever possible,” requires it to be someone's job to do so. But not every workplace or deliberation room gathering is graced with a foreperson who believes this is his or her job.

The idea that women speak up less than men could actually be perceived as a good thing for women – perhaps they think before they speak, and therefore, possibly, their thoughts are more clearly considered and articulated in other ways. And beware of mistaking their silence for agreement. If stifled at the front door, consider the “side window” they may find and how they enter it, because it represents a vote and the ability to sway.

I would love to say I have not personally experienced the silencing dismissal or the futile feeling of not being heard, but that would be my softened, Pollyanna view of my days in corporate America speaking along with my optimistic DNA that it wasn't “that bad”. That said, my mentor was a large, loud, and most importantly, talented and successful media buyer for Coca-Cola. She never would have joined the ranks of women who explain “watch what happens when we speak up”, as a dare to prove the dynamic is unfixable. And she would not have been happy if I did either.

Conclusion

Ultimately, it is clear that Sandberg and Grant are looking for the great “bias interrupter.” And so are we, as trial consultants – I just think we are having more success.

When we help trial attorneys take note of any of these factors listed above, in addition to gender, to understand to whom exactly they are presenting, we also ultimately help them persuade. ¹⁹

Suann Ingle, M.S., has been helping attorneys and executives deliver great presentations since the days before PowerPoint. Working with trial teams in national venues, from pitch to verdict, Suann integrates the principles of graphic design, jury research and analysis, simple and purposeful communication techniques, and interactive presentation technology to achieve consistent messaging and effective representation for her clients. You can read more about Ms. Ingle at her [website](#).



The Psychology of a Persuasive Settlement

by Ken Broda-Bahm, Ph. D.

WE ALL HAVE AN IMAGE in our heads of the way we expect cases to end: passionate presentations, gripping witness testimony, then a tense wait followed by the dramatic verdict. In the **great majority of cases**, however, the dispute will end not in a courtroom but in a conference room. After some awkward moments and handshakes, it will settle. Despite this, however, we all know that there are many cases that should settle but don't, and an even greater proportion of cases that only settle after far too much has been spent in time, patience, and money. Talking to the trial teams, it is clear that there is one common barrier to the timely settlement of those cases: the *other* side. Now, it may be that I'm just more likely to work for the side that is fair, reasonable, and realistic (and for any clients reading, let's assume that is the case). Or it may be that there is a large class of cases where *both sides* are saying in effect, "Believe me, we would settle this case if we could – if the other side would just see reason."

The realm of settlement has broad and increasing relevance to litigators and to litigation consultants alike. Instead of just the narrow frame of "jury consulting" or "trial consulting," those of us who work in shaping legal messages to legal audiences

should be looking closely at settlement as well. Not only does it account for a substantial proportion of case dispositions, but it also draws upon many of the skills we have in psychology and communication.

In this article, I want to take a look at some of the ways a psychologically-informed perspective on settlement communication could change the way we work. Specifically, I will focus on three questions:

- What prevents cases from settling?
- What's wrong with gamesmanship?
- What does a "good settlement" mean?

What Prevents Settlement-Worthy Cases From Settling

Settlement-worthy cases can end up avoiding or delaying resolution for many reasons, some good and some not so good. There can be legal barriers to settlement, or situations where settlement is not the rational option. But there are also psychological barriers: perspectives and habits that aren't working to either side's advantage, yet are still preventing or delaying case

resolution.

This first section of the article draws from a body of research and commentary on the psychology of Alternative Dispute Resolution, I'll be suggesting some ways of looking at the artificial barriers to settlement to see how they might be overcome.

The Common Psychological Walls

There are probably as many reasons for denied or delayed case settlements as there are cases. At the same time, a review of the advice and commentary provided by experienced mediators points to several psychological factors that are likely to play a role in making settlement harder in nearly every case. Let's look at a few of those barriers.

1. Confidence is an adaptive trait, but beyond hoping for the best, parties in litigation can sometimes anchor on an ideal outcome and see any deviation from that outcome as a net loss. In other words, if someone tells a plaintiff, "you have a million dollar case!" that plaintiff will often see a \$700,000 settlement not as a \$700,000 gain, but as a \$300,000 loss. This process of anchoring on a high expectation for outcome can translate into a high estimate of one's probability of winning as well. Writing a comprehensive review of the research on settlement psychology in the *Harvard Negotiation Law Review*, Richard Birke and Craig Fox (1999) observed that "if both sides overestimate their chances of prevailing in court, this bias will lead to excessive and costly discovery and litigation."
2. Beyond overestimating our chances, we also tend to devalue our adversary's arguments and overvalue our own: We always think we make much more sense than the other side. This is a process that California mediator and arbitrator John McCauley (2000) refers to as "partisan distortion," while noting that it is a virtually universal phenomenon among advocates in litigation. Birke & Fox (1999) cite research confirming that, "Most negotiators believe themselves to be more flexible, more purposeful, more fair, more competent, more honest, and more cooperative than their counterparts." The arbitrator and mediator Barry Goldman (2006) describes that as the "Lake Wobegon effect," in the sense that most believe themselves to be above average and we can't all be right.
3. Parties enter into a dispute with not just a need for resolution, but a need for judgment as well. We don't just want the conflict to end, we want someone to step in and tell us who is right and who is wrong. A fair and definitive outcome is not nearly as strong a motivator as vindication and a win. In Goldman's words, many clients like to see themselves as "The Avenging Sword of Justice," rather than as reasonable decision makers. "What this means to you as a lawyer," Goldman explains, "is that the person who comes into your office with a lawsuit believes he has a strong legal case; believes he is morally in the right; is willing to take plenty of risk; and believes he would be violating the laws of nature if he rolled over, caved in, wimped out, and

settled."

4. There is a simpler barrier – without some of the psychological nuance – that is probably more common. Many litigators delay settlement because they simply haven't yet dug into the details, and may not have a good knowledge of the strengths and weaknesses of their own case. In that condition, the sides are comfortable with broad and absolute negotiating stances ("Please give me the best result I can imagine getting and we'll settle..."), but less comfortable with the nuance and the assessment that true negotiations require. That absence of engagement can be a rationalized barrier, since it doesn't make sense to invest a lot of time preparing for a trial until we start to have a strong feeling that a trial is actually going to happen. While that rationale can make sense in some cases, in many others it doesn't. When a case drags on for years before client and trial team become fully informed and engaged, the slow drip of expenses can add up. A case-in-waiting for years can still generate some hefty bills, and these are expenses that don't necessarily improve the ultimate outcome.

Breaking Through: Moving From a "Trial Preparation" to a "Case Assessment" Mindset

Of course, settlement is a very complex calculation, and there is no one-step solution to these and the other barriers to settlement. But one strong step in the right direction is an engagement that leads to realistic assessment, and that means reorienting our thinking about many activities that have traditionally been seen as trial preparation. When we are focused on trial preparation for a trial that, at least nine times out of ten will never happen, it is easy to see the work as a waste and to avoid it or put it off. But much of the work that we tend to see as message improvement at trial, functions far better, and much more often, as case assessment and preparation for settlement.

There are a few things that trial teams could be doing to make sure that they're breaking down the barriers that would prevent a case from settling when it should.

Early Case Assessment

Before you're embroiled in discovery or putting on armor for trial, conduct a full, clear-eyed assessment of your case. Granted, you don't yet know all you would learn in discovery, but you do generally know the basic story outline from each party. And in most cases, fact finders are reacting to the story and then fitting that reaction to the evidence you discover.

Run a Mock Trial of the Other Side's Case

As Birke and Fox note, research shows that the "egocentric bias," or the tendency to see your case through an advocate's lens "was significantly mitigated when participants were asked to explicitly list weaknesses in their own case." Nothing forces you to identify your weaknesses like the act of stepping into your adversary's shoes.

Ground Your Case Evaluation Memo in Research

When attorneys write up memoranda to support a case assessment for a client, financier, or insurance company, that

assessment is often based on experience and subjective judgment. Why not add research, in the form of a focus group or a mock trial to that mix? The mock trial will not predict your trial result, but it will help inform your own judgment of the strengths, weaknesses, and probabilities that factor into your evaluation. Specifically, it can help you and your client to anchor on something other than a best case scenario.

Bring Research To The Attention of Your Mediator

We've written before that a mediator can often appreciate the perspective provided by an early mock trial or focus group, particularly when it allows you to admit to a weakness or two while still pressing your strengths. An additional opportunity is to design the research to directly serve the mediator who is working for both parties. We call that approach "Research Aided ADR" (or "RA-ADR, pronounced 'Radar' for short), and it can be a useful tool for focusing on the factual questions that most divide the parties and providing that opportunity for judgment that mediation can often lack.

One interesting dilemma is the possibility that everything that makes one a good advocate in trial — unshakable confidence, an ability to refute an adversary's every argument, and an unquenchable desire to win — can also make you a poor assessor for purposes of settlement. The trick is to develop a way to operate in both modes: the objective negotiator when you can, and the unshakable advocate when you must.

What's Wrong with Gamesmanship?

There is a perspective on negotiations focusing on tactics, secret strategies, or tricks. The problem with this tricks-based approach is that once you have two sides who think they know the tricks — like "never make the first offer," — then you're headed for a stalemate faster than a game of tic-tac-toe played by someone older than four. One such negotiating tactic is playing chicken, or taking an extreme and inflexible stance in order to force the other party to bargain down or face an even greater possible loss. At a time when approximately [two percent](#) of legal disputes are ended by a trial, the walk-up to trial itself is often a game of chicken. The strategy is to stick with an improbable "We'll see you in court" message for as long as possible in order to bring the other side around to your settlement demand.

But is playing chicken an effective tactic? While the threat of some sort of less favored alternative always plays a role in negotiations, the problem with communicating inflexibility is that it is too often believed. It can end up simply motivating a parallel approach, just as righteous and steadfast, from the other party. This second section of the article, looks at the game of chicken from a couple of different angles, and provides a few bits of advice on avoiding stalemate when trying to resolve your case.

Example: The Continuing Debt Ceiling Debate

It's been a common occurrence in Washington lately: here-

tofore routine request to increase to the federal debt ceiling touches off an escalating struggle between congressional Republicans and the Obama administration where, for months, the only apparent adjustment is for the parties to harden their positions and escalate their rhetoric. "Both sides are playing chicken," [Sebastian Mallaby](#) put it in a brief from the Council on Foreign Relations, "Both may swerve enough at the last minute to avert a collision. But games of chicken can be hard to exit. Leaders can get trapped by their own angry rhetoric: Having denounced your opponents as extremists, it's hard to explain to your partisan base why you decided to compromise with them. And recall what happened in the famous game of chicken in the James Dean movie, *Rebel Without a Cause* — Buzz Gunderson got his jacket tangled in the car door handle and drove off a cliff."

As it turned out, the political debate didn't end with a cliff, but it may as well have, since many analysts attribute the reduction in the country's [credit rating](#) to the fissures revealed in this dispute. And the same dispute is just getting ready to [play out again](#) this summer. Tactics can be habitual even when they aren't effective.

The consequence of hardened positions, in either politics or litigation, are predictable — and often predicted. But the parties end up being bound by the tactic. "Chicken is used in competitive negotiation by bluffing and threatening in order to get what you want," a current negotiation primer advises. "The problems with this strategy are that it has very high stakes and you must be willing to follow through on your threat." In legal cases, the threat — or the cliff — is generally trial. It remains a possibility, of course, but when your interests are better served by avoiding it, you want to make sure that your negotiating posture isn't entangling you in a course that is taking you to the courthouse.

A Few Simple Rules for Legal Settlement Negotiations

1. Don't Waste Time on Nonstarters

The problem in the debt ceiling debates, both past and present, is that the two sides are starting with positions that they know will be rejected by the other side. Republicans want deep and dramatic spending reductions and/or a balanced budget amendment, which Democrats will not agree to during a recession. Democrats want tax increases on upper incomes which Republicans have pledged not to enact. Both sides start with, and stick to, a proposal that the other side considers a nonstarter.

The same can happen in litigation. I once sat in on part of a mediation with a group of lawyers for the defense. When the mediator came in the door with the plaintiff's first offer — an incredibly high demand from our perspective. "We'll take it!" the client representative replied in a chipper voice. The entire room including the mediator burst out laughing in response to the obvious sarcasm — after all, who would expect that the offer would actually be accepted? But as I looked around the

room at probably twenty attorneys all billing high rates, it occurred to me that this posturing takes time, and time literally is money in this case. Granted, the initial demand can sometimes be made merely to establish a range and not determine a result. But when it comes to subsequent numbers, why not spend the time where it is most likely to lead to a realistic deal?

2. Don't Waste Time on Tit for Tat Negotiating

Writing in the [Maryland Injury Lawyer Blog](#), Ronald V. Miller illustrates the common approach of negotiating by saying, "We've come down by \$100,000 so you need to come up by \$100,000" or vice-versa. Reciprocity is a strong principle in human relations, but in the case of settlement negotiations, the two sides aren't exactly in the same boat. As Miller explains, "the problem is that many adjusters think that plaintiffs have no ceiling on the amount that they can demand, whereas defendants can never offer anything less than zero." For that reason, the sacrifice in the plaintiff's reduction is not parallel to the sacrifice in a defendant's increase.

The problem with the approach is also that it is blind to the case itself. If you are haggling over money alone, then you could be talking about anything. Instead, you should be focused on a case with merits that influence the ultimate resolution. We've [written before](#) that it helps if you separate the "positioning phase," where you argue merits, from the "bargaining phase" where you make offers and counteroffers, but those stances should still be based on some measure of case value.

3. Base Your Demands on Law and Specific Case Analysis.

Ronald V. Miller also stresses that numbers need to be grounded in reality. "If you are demanding the cap in a soft tissue injury claim, you are also sending the wrong message. Similarly, when you demand \$5 million in a case where your cap is \$2 million, you are sending the same 'I'm not exactly sure what I'm doing' message." While caps help to frame the appropriate range, they have the disadvantage of being blind to the circumstances of your case. A more specific measure of potential exposure or opportunity can often be found in pre-trial research. When several panels of mock jurors are reacting to both side's summary arguments and deciding on the value of a specific case, that can provide very useful information. Of course, the research design has to be customized to that purpose: If mock jurors hear little to nothing on damages, then their deliberations on numbers won't have much value – the reasoning they use can be interesting, but the values themselves are much less important. If instead, the project is designed to focus on case value and the mock jurors hear each side's basis, then the resulting discussion and decision can help to set your expectations on a reasonable range. While it isn't a prediction of trial outcome, when the research is done right it is substantially better than a guess.

One way out of the game of chicken is to hope for capitulation by the other side before you go over the edge. The other

way out is not to play the game in the first place. That doesn't mean giving away the farm, but it should mean focusing on offers and counteroffers that are fair, realistic, and grounded in a specific analysis of your case.

What Does a 'Good Settlement' Mean?

I'd say it starts with that fuzzy concept of "happiness." If we don't normally think of "happiness" when we think of mediation, it may be because a good settlement is generally not something that makes all the parties happy. Instead, it is more often something that makes the parties equally unhappy. At the same time the notion of happiness, or at least relative satisfaction, has an important role to play in determining when cases settle. In this final section of the article, I want to end on a positive note by looking at a few of the ways happiness can impact the process.

Settlement is above all a negotiation. But apart from the grim calculation of economic value at the end of a legal dispute, there are also the less tangible measures of satisfaction: Do the parties feel validated, respected, and vindicated? Are they happy? The term itself may seem a little fluffy, I admit. But proving that there is nothing that determined academics can't turn into a discipline, the study of happiness — the field known as "hedonics" — is receiving increasing attention. And it is a field that is worth thinking about for litigators who focus on ending their cases well, most often in the form of a mediated solution that the parties can live with. This post takes a look at some of the research on happiness that bears most heavily on civil settlement, pairing that with ideas on some ways litigators can increase their clients' satisfaction with the result.

Calculation of happiness, of course, is an individual act that comes from knowing your client and their concerns. At the same time, there are some psychological forces involved that shouldn't be lost in a focus on economic valuation alone. I recommend three considerations for thinking about happiness and your case settlement.

1. Consider the Possibility that Litigation Is a "Focusing Illusion"

Lets start with a quick look at the way we think about happiness itself. Our satisfaction, of course, can be experienced in the present, remembered in the past, or forecast in the future. As you might expect, we have not all quite reached a zen level of present-ness, and our experience in the moment doesn't drive us as much as our recollections about the past or, particularly for decision making, our forecasts for the future. One breakthrough article ([Schkade & Kahneman, 1998](#)) in the field of hedonics asked the question, "Does living in California make people happy?" The answer is, "not nearly as much as we might think it does." When people consider the impact of one factor on their overall happiness, they are prone to greatly exaggerate the influence of that factor, and overlook many other factors that might play a greater role. Professor Daniel Kahneman calls this a "focusing illusion," and it might

inform the calculations that parties make in the long walk up to civil trial. As they think about the effect that a verdict, for good or for ill, might have on their happiness, they are apt to exaggerate. As Schkade and Kahneman note, “Nothing in life is quite as important as you think it is while you are thinking about it.” And if thoughts of litigation outcomes function as focusing illusions, then maybe that explains why the parties come to have such different views on the importance and value of their claims, views that diverge over time instead of coming closer together. In short, psychology is pushing the parties toward different and potentially irreconcilable views of the case.

So one obvious recommendation that I’ve made before is this: Provide clients with a reality check. Instead of leaving the parties, and counsel as well, with their own estimations of case merit, value, and probability, get past the illusions by providing one or more early sounding boards in the form of focus groups and mock trials.

2. Consider An Apology to Promote Settlement

In the *Persuasive Litigator* blog, we have [written previously](#) that apologies can help cases to settle. Supplementing the increasing experience of defendants in settings like medical malpractice, experimental research confirms that apologies increase the acceptability of settlement offers by improving the credibility and the favorability of the party making the offer ([Robbenolt, 2003](#)). The finding is that complete apologies – those that convey remorse, responsibility, repair and reform – ([Bouly, 2007](#)), tend to work while partial apologies – e.g., “I’m sorry you feel that way...” – will fail or even make things worse. This suggests that the reason that an apology works is that it brings greater satisfaction. Because it contains an acknowledgement of wrongdoing, it validates the harmed party’s perceptions. Because it communicates a commitment to fix the problem and prevent it in the future, and provides a sense of vindication, it adds to the level of happiness that would have been provided by a monetary settlement alone.

3. Consider the Effect of Time

Time is usually blamed for adding to the misery of litigation. As the wait for justice moves from months to years, the delay has a cost that is financial as well as psychological. For both sides, it can also raise the stakes in a way that makes settlement less likely since the parties are now looking for a result that makes it all worth it. There may, however, be a silver lining to delay in some cases. Research looking at the role of happiness in a litigation settlement context points in what might be an unexpected direction. [Bronsteen, Buccafusco & Masur \(2008\)](#) apply the research on “hedonic adaptation,” or loosely translated as our ability to “get over it” over time. Injured parties, they argue, will initially predict greatly diminished happiness as a result of the injury, but over time they will adapt to the change and their overall happiness comes back into balance. That finding may seem counterintuitive,

but the article cites research showing that even fairly extreme events that are positive (winning the lottery) or negative (becoming disabled) have little long-term effect on our subjective happiness, due to our ability to adapt. That means that a plaintiff is likely to set the bar very high initially for what would make them whole, and then gradually lower that bar as it becomes clear that that the loss is not as grave as they once forecast it to be. “Adaptation will drive down the settlement prices for many personal injury plaintiffs,” the authors argue, “enlarging the available window for negotiation between plaintiffs and defendants and increasing the rate of settlement.”

Before defendants embrace delay as a strategy – any more than they already have – there are other views (e.g., [Huang, 2008](#)) suggesting that it is not as simple as delay equaling a lower settlement. In many cases, adaptation is slow or incomplete, and we might expect that a continuing battle in the litigation arena might nurture or enhance the perceived wrongs.

Ultimately, the message from the apology research and the adaptation research is that both timing and tone should be taken into account in resolving legal disputes. Instead of seeing settlement as just a business negotiation designed to maximize value, it helps to also see it as a “speech act” in its own right, or as a message that carries a separate meaning independent of the money being offered or accepted. Instead of seeing settlement as just a question of when the other side will come to the table, it is also a question of when your client is psychologically ready for realistic closure. ©

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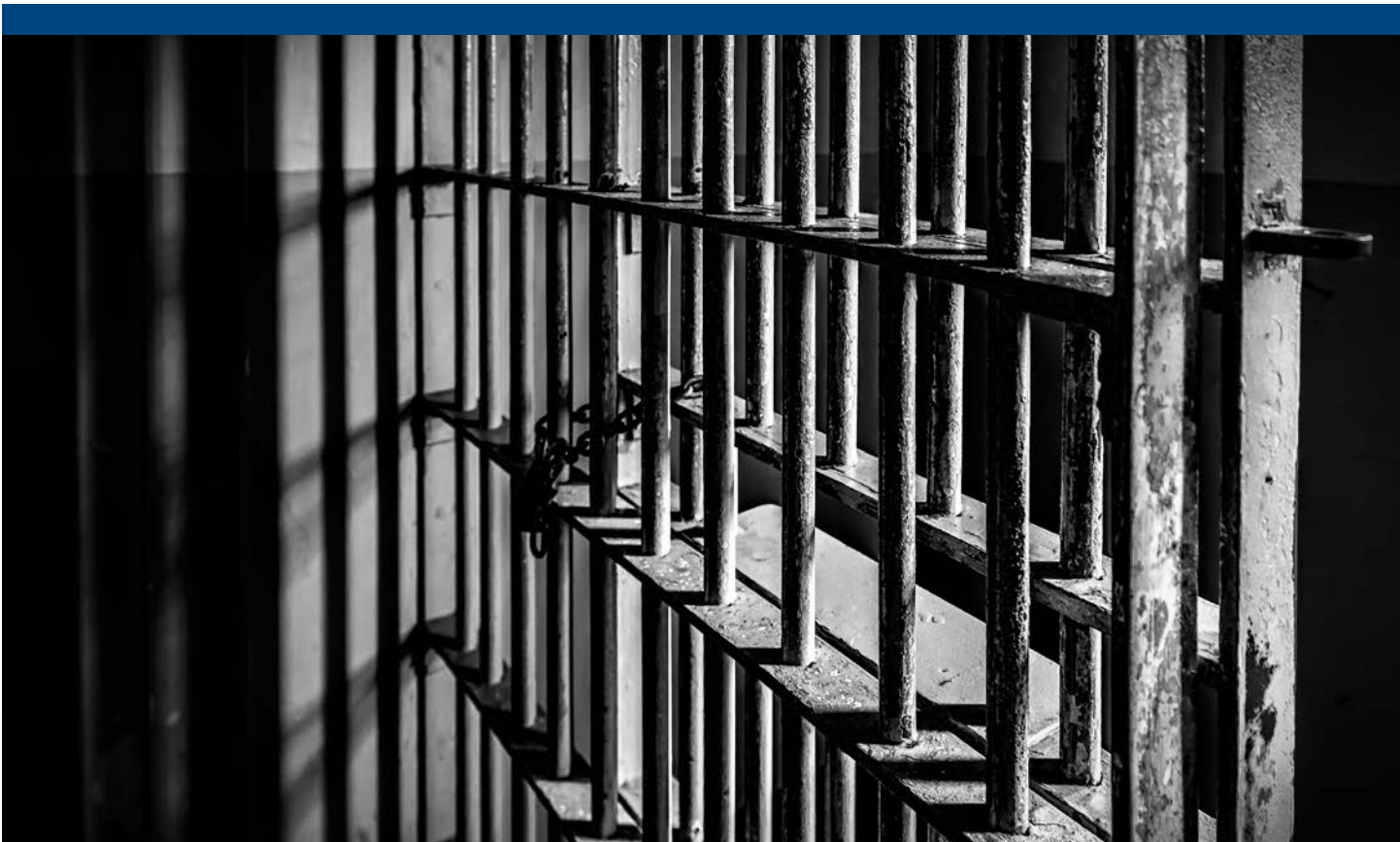
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Note: Content for this article is adopted from three posts in the author's blog, Persuasive Litigator.



Racial Disparities in Legal Outcomes: On Policing, Charging Decisions, and Criminal Trial Proceedings

by Samuel R. Sommers, Ph.D. and Satia A. Marotta

Editor Note: We don't typically do reprints here at The Jury Expert, but in this case, we really wanted you all to see this article. This article was originally published in Policy Insights from the Behavioral and Brain Sciences, 2014, 1(1), 103-111. We thank both the PIBBS journal editor and the senior author for granting us permission to reprint it here.

Introduction

EARLY IN THE EVENING of February 26, 2012, Trayvon Martin, an African American 17-year-old, was shot and killed in a gated community in Florida. The shooter, 28-year-old George Zimmerman, a neighborhood watch coordinator, was taken into custody but soon released upon persuading police that he killed the teenager in self-defense. The details of the criminal investigation and trial that followed are well known; Martin's death and Zimmerman's ultimate acquittal dominated cable news television, print media, and the blogosphere throughout 2012 and the first half of 2013.

The present article does not offer a detailed analysis of this case. Its objective is not to assess whether Martin's race influenced Zimmerman's behavior; whether race played a role in the ini-

tial decision to release Zimmerman from custody; or whether race (in terms of victim, defendant, or jury composition) contributed to Zimmerman's acquittal. Indeed, the empirical conclusions offered by behavioral science rarely permit definitive conclusions concerning the extent to which any one factor has contributed to the outcome of a particular case. Behavioral scientists draw conclusions in terms of probability and data aggregated across samples and scenarios: the presence of X renders Y significantly more likely. We usually do not seek (and are not able) to offer definitive conclusions such as in this instance, X led to Y.

Instead, this article focuses on what behavioral science research can tell us about the general relationship between race and legal outcomes, and its potential policy implications. Specifically, we will consider three domains, reviewing the influence of race on (a) policing, (b) charging decisions, and (c) criminal trial outcomes. We open with the shooting of Trayvon Martin because the facts surrounding Martin's violent death and its legal aftermath illustrate important questions for all three domains.

First, the original controversy revolved around whether Zim-

merman's actions that fatal night were biased by Martin's being a young, African American male. Was it Martin's race that, at least in part, attracted Zimmerman's attention, marking Martin as a suspicious character warranting surveillance? Did Zimmerman perceive Martin's subsequent actions as more threatening or furtive because Martin was Black? Recent research sheds light on perception, cognition, and behavior related to these questions. And although Zimmerman was not a police officer, we will examine research that focuses more directly on the influence of race on policing and consider potential strategies for curtailng such biases.

Second, in the wake of what became oversaturated coverage of the case, it is easy to forget that for weeks, Martin's death received no particular notice. Certainly not from popular media or the general public, but, some would argue, not from local law enforcement either. Zimmerman was taken into custody immediately but released without charges, the police satisfied with his explanation of self-defense. It was not until social media initiated efforts to draw attention to the case that, in mid-March, the Department of Justice announced an investigation, and the Seminole County State Attorney's Office revealed plans for a grand jury. And, thus, other questions emerged: Would police have been as quick to release Zimmerman had he killed a White teen? To what extent did Martin's race shape perceptions of the self-defense claims and discourse surrounding Florida's "Stand Your Ground" law? Although there is a dearth of data directly examining how demographics affect charging decisions, we will review research on related processes.

Third, new questions related to race emerged in 2013 as Zimmerman's case proceeded to trial. For instance, in what ways did the racial background of witnesses who took the stand or the demographic composition of the jury—six women, five of whom self-identified as White—shape its deliberations and verdict? Behavioral science research indicates the influence of defendant race, victim race, and jury racial composition on criminal trial outcomes, and suggests policy considerations to address such disparities.

Race and Policing

A (potential) suspect's racial group membership can influence how people view this individual. Generally, research links exposure to Black faces and perceptions of danger or threat. In one study (Payne, 2001), participants had to quickly identify objects as either dangerous (e.g., a weapon) or harmless (e.g., a tool). Before some objects appeared, a photograph of a White male's face briefly flashed on the screen; before other images, a photograph of a Black male flashed. Although respondents could not articulate what exactly they saw before the object appeared, the initial photos were influential: After exposure to a Black face, participants were quicker to identify objects as dangerous and more likely to mistake a harmless tool for a gun.

This mental link between thinking about African Americans and seeing threat is often drawn automatically and need not

reflect conscious racial attitudes. It also appears on many measures, including neurological research using functional magnetic resonance imaging (fMRI) technology: When White participants view photos of Black and White faces, the Black faces trigger activation in the amygdala, a brain region implicated in vigilance (e.g., Cunningham & Browning, 2004). Behavior is also interpreted differently depending on the race of the actor: White observers view, for example, the same ambiguous shove as more violent when performed by a Black man than by a White man (Duncan, 1976).

This tendency to implicitly associate certain groups (particularly African Americans and Latinos; Judd, Sadler, Correll, & Park, 2012) with criminality goes in both directions. That is, prompting people to think about these racial groups makes thoughts about crime more accessible, and prompting thoughts about crime makes thinking about these racial groups more likely. For example, not only do subliminal photos of Black males make participants quicker to identify an ambiguous object as a weapon, but priming crime-related imagery also makes participants more likely to look at Black versus White faces (Eberhardt, Goff, Purdie, & Davies, 2004). Police officers as well as lay people demonstrate this tendency, suggesting that the cognitive association between race and crime is not limited to civilians.

A suspect's race shapes—sometimes unconsciously—the thoughts, attention, and inferences of others, including police. However, what about behavior? Do cognitive associations also translate into different actions? Investigations using a first-person shooter simulation have suggested that they do, demonstrating a "shooter bias." In these studies, civilians viewed a series of photos of a White or Black individual holding an object. Sometimes the object was a gun and sometimes it was something else of similar size and color (e.g., black wallet, silver camera). Participants had to decide as quickly as possible whether the target male was a threat. They recorded a response by pressing the appropriate button in front of them: One labeled shoot for when the target held a gun; one labeled don't shoot for when he was unarmed. Race had a significant effect on task speed and accuracy. When the person was unarmed, participants mistakenly decided to shoot more often if he was Black than White. Personal stereotypes or prejudices did not predict performance on the task, but awareness of societal stereotypes about Blacks and violence did. In short, shooter bias need not derive from racial hatred, but rather can reflect cultural associations between race and crime.

Using this shooter paradigm with police participants has produced more mixed results. Police also take longer to respond to stereotype-inconsistent stimuli, such as unarmed Black targets and armed White targets (Correll et al., 2007). However, when it comes to the actual decision to "shoot" or "not shoot," police do not perform differently by target race, indicating that perhaps experience can attenuate shooter bias. Indeed, although police at first exhibit shooter bias during the course of their experimental sessions, this effect disappears over time, as they

gain more simulation experience (Plant & Peruche, 2005).

Of course, simulations and other controlled laboratory studies, realistic though they strive to be, do not involve the same challenges inherent in actual policing. However, realworld data converge with these conclusions. For instance, in its 2013 ruling on the New York Police Department's (NYPD) "Stop and Frisk" policy, a U.S. District Court cited data indicating that—much as research participants pay disproportionate attention to members of particular groups when thinking about crime—police also apply enforcement efforts in an inequitable manner (*Floyd v. City of New York*, 2013). Of the more than four million stops the NYPD conducted between 2004 and 2012, 52% were of African Americans and 31% of Latinos, despite respective general population rates in the city of 23% and 29%—and although stops of African Americans and Latinos were actually less likely to yield weapons or contraband than were stops of Whites (see also Gelman, Fagan, & Kiss, 2007). Beyond New York, 27 independent data sets from different jurisdictions also revealed consistent evidence that minority suspects were more likely to be arrested than White suspects (Kochel, Wilson, & Mastrofski, 2011).

Data on the use of force tell a similar story. Once again looking at NYPD "Stop and Frisk" encounters, use of force occurred in 23% of stops of African Americans and 24% of stops of Latinos, but in only 17% of stops of Whites (*Floyd v. City of New York*, 2013). Although these numbers tell us little regarding the specifics of each encounter, they fit behavioral science conclusions that the suspects' race influences how threatening they seem. Again, note that African American and Latino New Yorkers were actually less likely to possess contraband than their White counterparts, ruling out actual guilt as an alternative explanation. Similar disparities have been observed in other police data, with analyses indicating that African Americans are up to 4 times as likely as White civilians to experience use of force (see Goff & Kahn, 2012).

In short, behavioral science research and actual policing data identify a statistically significant relationship showing that Blacks and Latinos are perceived and treated differently than Whites, by ordinary citizens and by police. What policy interventions are feasible? One strategy would identify when such racial disparities are most likely, and then modify police procedures accordingly. For instance, "shooter bias" is exacerbated when respondents are tired (Ma et al., 2013), rushed (Payne, 2006), or cannot see well (Payne, Shimizu, & Jacoby, 2005). Some of these circumstances are unavoidable during actual policing. However, any staffing and scheduling steps that minimize officer fatigue also could curb some of these racial disparities.

Another category of policy implications involves police demographics: Perhaps more diverse police forces would reduce bias. Indeed, in general terms, an organization's diversity often grants it greater legitimacy (Ely & Thomas, 2001). However, in race and policing, personal endorsement of stereotypes of

ten does not predict performance (e.g., Correll, Park, Judd, & Wittenbrink, 2002). Few studies examine directly whether policing tendencies vary by officer race, although some data hint that African Americans might demonstrate less racial bias on a first-person shooter task (e.g., Correll et al., 2007). Still, research to date gives little direct basis for confidence in force diversity as a cure-all for racial disparities.

Researchers have more often addressed training as an intervention. For example, officers' classroom and firearm training do not predict shooter task performance (Correll et al., 2007). However, experience with simulated building searches—in which officers interact with actors, some of whom "attack" using weapons with non-lethal ammunition—does predict reduced bias. Shooter bias also attenuates with increased experience on the task (Plant, Peruche, & Butz, 2005), especially among police who have had positive contact with African Americans in their personal lives (Peruche & Plant, 2006). To effectively reduce bias, however, the training must allow officers to discover that there is no actual relationship between target race and threat. Not surprisingly, training that reinforces such an association exacerbates bias (Sim, Correll, & Sadler, 2013).

How best to address racial disparities in policing remains an open debate, much like more general societal efforts to reduce implicit bias (Lai, Hoffman, & Nosek, 2013). One certainty, however, is that more data are needed; not just from behavioral scientists but also about actual police stops and contacts with civilians. These data can provide a more complete picture of what predicts disparities in the field and how to assess bias-reduction interventions (Goff & Kahn, 2012). In a noteworthy step in this direction, in 2013, the National Science Foundation awarded funding to the Center for Policing Equity, an interdisciplinary research and action consortium, to create a national "Justice Database" that will standardize data collection concerning stops and use of force among a majority of "major city" police departments across North America. That this initiative was established not just in cooperation with police but actually at their request inspires optimism for future efforts to assess and address racial disparities in policing outcomes.

Race and Charging Decisions

After an arrest, prosecutors must decide whether and how to charge a suspect. Compared with policing research, far fewer studies have examined the influence of race on this process, despite the potential for racial bias to contribute to systemwide disparities (Free, 2002). In our opening example, this potential disparity initially inspired grassroots efforts to call attention to Trayvon Martin's death, raising questions such as why was George Zimmerman released from custody without charges, and what role did Martin's race play in this decision?

Consider, for example, the finding that homicides involving White victims—particularly those with a Black defendant accused of murdering a White victim—are significantly more likely to end in a death sentence than are homicides of Black

victims (e.g., Baldus, Woodworth, & Pulaski, 1990). Although many discuss this disparity in terms of jury bias, prosecutorial discretion plays a major role, with prosecutors more likely to charge capital murder and seek the death penalty in cases with Black defendants and/or White victims (Paternoster & Brame, 2008; for findings for Latinos, see Lee, 2007). This, combined with the fact that more than 90% of all guilty verdicts result from plea bargains and not juries (Hollander-Blumoff, 2007), demonstrates a clear need for further study of how race shapes attorney perceptions and decision making.

Whereas few experiments have directly addressed these issues, studies have examined relevant influences of race. For example, consider race and juvenile assessment. Traditionally, juvenile offenders have been considered less culpable than adults, their cases handled in juvenile court, and their sentences less punitive. Recently, however, the system has begun transferring more juveniles to the adult system for serious offenses (see Feld, 1999), despite a steady decrease in crime. Much discretion enters such determinations that a juvenile should be “charged as an adult.” Are these decisions, therefore, subject to similar racial disparities as other charging outcomes?

One experiment had a community sample read about an actual (at the time, ongoing) U.S. Supreme Court case regarding the constitutionality of life sentences for juvenile offenders of serious crimes (Rattan, Levine, Dweck, & Eberhardt, 2012). Embedded in this information was an example of a 14-year-old male with more than a dozen previous juvenile convictions who was now facing rape charges. For some respondents, this juvenile was identified as White; for some respondents, he was Black. This variation shaped participants’ general attitudes: After having read about a Black versus White juvenile offender, they reported perceiving juveniles as more similar to adults and expressed greater support for charging juveniles as adults. Similarly, perceptions of the “innocence of children” are stronger for White than Black youth. Both college and police participants view Black juveniles accused of felonies as more culpable than White juveniles; participants also overestimate the age of Black offenders (Goff, Jackson, Di Leone, Culotta, & DiTomasso, 2014). These findings echo analyses of actual case data: Black children are up to 18 times more likely than White children to be sentenced as adults (Poe-Yamagata & Jones, 2007).

Other discretion related to charging has not been explored substantively. For example, few studies examine perceptions of self-defense, a pivotal issue in charging decisions after George Zimmerman’s arrest. One exception was an archival study of FBI data, which indicated that law enforcement is more likely to find White-on-Black homicides justified as self-defense, compared with other homicide demographics, particularly in states with “Stand Your Ground” laws (Roman, 2013). Because determinations related to self-defense often hinge on subjective assessment of whether actors reasonably perceived themselves to be in danger, empirical findings regarding race/threat associations also provide a basis for predicting that race can color

perceptions related to self-defense (Richardson & Goff, 2012).

What accounts for disparities in charging? As with policing, racial animus is a plausible, but not necessary, contributor. Unconscious associations between race and criminality—even if not personally endorsed by decision makers—may play a role. Moreover, some disparities in charging may result from strategic considerations of other people’s unconscious associations. Race can influence a prosecutor’s assessment of how sympathetic a particular defendant or victim will be to the jury, and, therefore, whether and which charges are worth pursuing (Frohmann, 1997). Race can also affect the zeal with which attorneys defend a client and their beliefs regarding what is the “best deal on the table”: In a scenario involving a Black defendant, defense attorneys are likely to accept a more punitive plea than they would for the same scenario with a White defendant (Edkins, 2011).

Empathy for crime victims is also implicated in charging decisions, and race may also predict empathy with victims. Asked to rate how painful various circumstances would be for a fictitious individual (Trawalter, Hoffman, & Waytz, 2012), both White and Black participants saw Black people as feeling less pain than Whites. Similarly, Black and Latino emergency room patients are less likely than Whites to receive pain medication (e.g., Todd, Deaton, D’Adamo, & Goe, 2000). Moreover, brain regions associated with experiencing (and empathizing with) pain are more active when Whites think about the painful experiences of White individuals as opposed to those of other groups (Xu, Zuo, Wang, & Han, 2009).

It seems premature to address specific policy recommendations for disparities in charging decisions when the disparities themselves (and their underlying causes) remain relatively under-researched. As yet one more example, consider the mixed findings regarding another process related to the treatment of defendants of different backgrounds: bail and pre-trial release decisions. Some research indicates that race influences bail amounts and the likelihood that a defendant remains in custody before trial (e.g., Turner & Johnson, 2005). However, other studies have reported no evidence of disparities in bail, pre-trial release, or prosecutorial decisions to dismiss charges (e.g., Romain & Freiburger, 2013).

This lack of research on charging and related decisions calls for additional research. Given that prosecutors play a key role in outcomes, the dearth of data on prosecutorial discretion is a noteworthy gap. Consider a proposal from Paternoster and Brame (2008):

It is not inconceivable to conduct an actual experiment in which prosecutors would be asked to decide whether they would seek a death sentence after reading a hypothetical case record of the homicide with the perceived race of the defendant and victim experimentally manip-

ulated. (p. 28)

Such studies are more than “not inconceivable.” They are absolutely necessary and precisely what is required to better identify, explain, and address potential disparities in charging decisions.

Race and Trial Outcomes

Race can influence what happens in court as well. For example, a defendant’s race has a biasing influence on jurors. Some researchers have examined this issue via mock jury simulation, in which the same trial summary is presented to different mock jurors, some of whom might read about, say, a Black defendant whereas others read about a White defendant. Compared with White defendants, Black defendants receive harsher mock verdicts and sentencing² (e.g., Sommers, 2007; Sweeney & Haney, 1992). A quantitative analysis of previous research findings from 34 studies involving more than 7,000 participants determined that “research on this issue indicates a small, but significant, effect for racial bias in both verdict and sentencing decisions” (T. L. Mitchell, Haw, Pfeifer, & Meissner, 2005, p. 629).

Actual cases show the same patterns in how judges sentence. Archival data from more than 70 studies, in federal and non-federal courts, document Black defendants receiving more severe sentences than White defendants (O. Mitchell, 2005). These findings control for both severity of offense and previous criminal history, indicating that the racial disparity persists even when these other factors were accounted for. Latino defendants in actual cases also receive more severe sentences (Demuth & Steffensmeier, 2004).

Of course, these generalized patterns do not permit conclusions about whether any particular defendant would have received a different verdict/sentence had he been of a different race. Like mock jury data, analyses of actual cases have identified a significant, but small, relationship between race and trial outcomes, one that varies across a range of case factors and studies. Moreover, as societal norms regarding race evolve, so may responses to particular case facts. In one recent report, case materials that had elicited racial bias a decade and a half ago did not produce the same pattern among contemporary mock jurors (Elek & Hannaford-Agor, 2014; cf., Sommers & Ellsworth, 2001).

Defendant race works in conjunction with victim race and jury racial composition. As noted, archival analyses of capital cases have indicated that trials involving a White victim are more likely to end in a death sentence than those involving a Black victim, a disparity even stronger in Black defendant/ White victim cases; this pattern occurs across studies, time periods, and states (Baldus, Broffitt, Weiner, Woodworth, & Zuckerman, 1998; Baldus et al., 1990). DNA exonerations— when later forensic analysis reveals that a defendant was wrongfully convicted—also mirror this disparity. Specifically, whereas only

29% of rape prisoners in 2002 were Black, 64% of rape exonerations involved Black defendants, the vast majority convicted of crimes against White victims (Gross, Jacoby, Matheson, Montgomery, & Patil, 2005).

In terms of jury racial composition, actual trial outcomes and mock jury simulations indicate that the greater the proportion of White men on a capital jury, the greater the likelihood that a Black defendant is sentenced to death (Bowers, Steiner, & Sandys, 2001; Lynch & Haney, 2009). This is not limited to capital sentencing. In almost 200 actual juries in felony cases with Black defendants in Arizona, California, New York, and Washington, D.C., the greater the percentage of Whites on a jury, the more likely it was to convict a Black defendant (Williams & Burek, 2008). This association persisted regardless of crime type or strength of prosecution case (see also Bradbury & Williams, 2013). Such patterns also extend beyond the White/Black dichotomy: In more than 300 non-felony juries in Texas, majority-White juries were harsher toward Latino defendants than were majority-Latino juries (Daudistel, Hosch, Holmes, & Graves, 1999).

In short, the potential for race to influence trial proceedings has been well documented. But how and why does it happen? Identifying mechanisms is critical for potential policy interventions aimed at reducing such disparities. Certainly, some jurors express overtly hostile attitudes toward certain racial groups, and this animus can produce bias. Potential remedies for explicit bias include anything that increases litigants’ and judges’ ability to identify such jurors during jury selection (i.e., voir dire). For example, minimal voir dire, in which the judge conducts brief questioning with little participation from attorneys, might yield to more extended questioning (Kovera, Dickinson, & Cutler, 2003). Yet, identifying overtly biased jurors remains challenging when such individuals are motivated to hide it.

These race effects also draw on implicit bias. Defendant race can subtly influence jurors’ expectations about culpability, dangerousness, and credibility; victim race can unconsciously guide juror empathy. Clear judicial instruction regarding the importance of impartiality may compel jurors to try to control such biases (Pfeifer & Ogloff, 1991). Efforts are also underway to tailor instructions specifically to curtail unconscious bias (Elek & Hannaford-Agor, 2014). Indeed, judges themselves can effectively compensate for implicit bias when reminded and motivated (Rachlinski, Johnson, Wistrich, & Guthrie, 2009). Further studies should determine the optimal scope and timing of such instructions for attenuating bias among jurors, although some research has questioned the comprehensibility and effectiveness of judicial instructions in general (e.g., Lieberman & Sales, 1997).

Clearly, racial composition is associated with different jury decision making and outcomes. For one, more diverse juries inspire greater lay confidence in the fairness of the legal system (Ellis & Diamond, 2003). Consider the public reaction to a predominantly White jury’s acquittal of George Zimmerman.

However, beyond perceived legitimacy, racial composition can also affect a jury's actual performance, as illustrated. Once more, the pressing question is why.

A straightforward explanation is that jurors of different racial backgrounds often have different life experiences, perspectives about crime and policing, and other viewpoints that shape deliberations and a jury's final verdict. Epitomizing this idea is Justice Thurgood Marshall's opinion in a 1972 U.S. Supreme Court case:

When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. (*Peters v. Kiff*, 1972, p. 503)

Here, Justice Marshall suggests that unrepresentative juries not only cast doubt on system legitimacy but also influence deliberations and verdicts.

Obstacles to representative juries (Sommers, 2008) include creating jury pools via public records that underrepresent certain racial groups (e.g., driver's licenses, voter rolls); failure to update jury pool lists frequently, resulting in higher rates of undeliverable summonses to mobile citizens (e.g., renters); and attorneys' use of race-based peremptory challenges in seeking to empanel sympathetic juries (see Sommers & Norton, 2008). Policy changes to address unrepresentative juries therefore range from steps taken to recruit a more diverse group of citizens for jury duty, to changes in the jury selection procedure itself (e.g., reducing or even eliminating peremptory challenges). Of course, any reduction in litigants' discretion to remove prospective jurors from a jury also complicates efforts to prevent explicitly prejudiced individuals from being empaneled.

Effects of a jury's composition can be more complicated than Justice Marshall's quotation suggests. Jury diversity affects White jurors too (Sommers, 2006): Awareness that they were on a racially heterogeneous jury led White mock jurors to be more skeptical of a Black defendant's guilt, to make fewer factually inaccurate statements when discussing the case, and to be less resistant to talking about controversial issues during deliberations (compared with Whites on all-White mock juries). These results highlight important differences concerning the influence of diversity across legal domains. Policing differences by officer race are scarce, perhaps indicating that many police decisions are of a split-second nature, where personal prejudice is less important than cultural biases. Juries rely on knee-jerk impressions as well, but their ultimate decisions are more deliberative. Perhaps steps to promote institutional diversity may be more fruitful for reducing racially disparate outcomes among juries.

In sum, influences of race on trial outcomes are many and

complex. Potential policy interventions vary by specific target—defendant race, victim race, jury racial composition—and by whether the underlying cause is an empathy gap, overt animus, or implicit bias. Yet, biases in trial outcomes are just one of many potential sources of racial disparity in the legal system, especially because few cases ever proceed to trial. Yes, many questioned the role that the jury's composition played in George Zimmerman's acquittal, but this was only the final chapter in a longer saga involving police investigation and prosecutorial discretion. Researchers and policy makers would be remiss to focus future attention exclusively on the jury, when disparity also emerges earlier in the legal pipeline, from police enforcement priorities to on-the-ground policing, from charging decisions to jury-duty summonses.

Concluding Thoughts

One of the strongest tools for combating implicit bias is consciousness raising—making our unconscious associations conscious, and simply recognizing that bias can occur even among those of good intent. For racial disparities in legal outcomes, such acknowledgment of potential problems need not be cast as a “political issue.” Individuals with different ideologies and political affiliations may well debate police enforcement priorities or factors that contribute to crime. However, people on both sides of the political aisle (and proverbial thin blue line) can agree that differential rates of police stops by suspect race—when unaccompanied by actual racial differences in illegal activity or seizure of contraband—are problematic, not to mention inefficient resource deployment. Similarly, most could agree that racial disparities in charging decisions, jury verdicts, and sentencing violate core American principles related to justice.

No one-size-fits-all policy insight will remedy such disparities. For that matter, behavioral science research will never be able to determine with absolute confidence that the death of Trayvon Martin (or any other particular case) would have been handled differently had it involved individuals of different racial backgrounds. However, research identifies how and when bias is most likely. Initial policy interventions include bias training, efforts to promote institutional diversity, and increased documentation of the precise nature of these disparities, as epitomized by the current policing initiative of a national justice database. Also essential will be continued analysis outside the system, by behavioral scientists and others, to expand the scope of relevant data and to keep up with ever-evolving norms regarding race, diversity, and difference. ●

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Note

1. Using common terms, we refer throughout to race and racial disparity, although we will also review findings regarding Latino suspects, defendants, and jurors, and “Hispanic” is typically considered an ethnicity. Similarly, we use “African American” and “Black” interchangeably, but mostly rely on “Black,” given its use in behavioral science.
2. Note that except for capital cases, sentencing is almost always the responsibility of judges, not juries.

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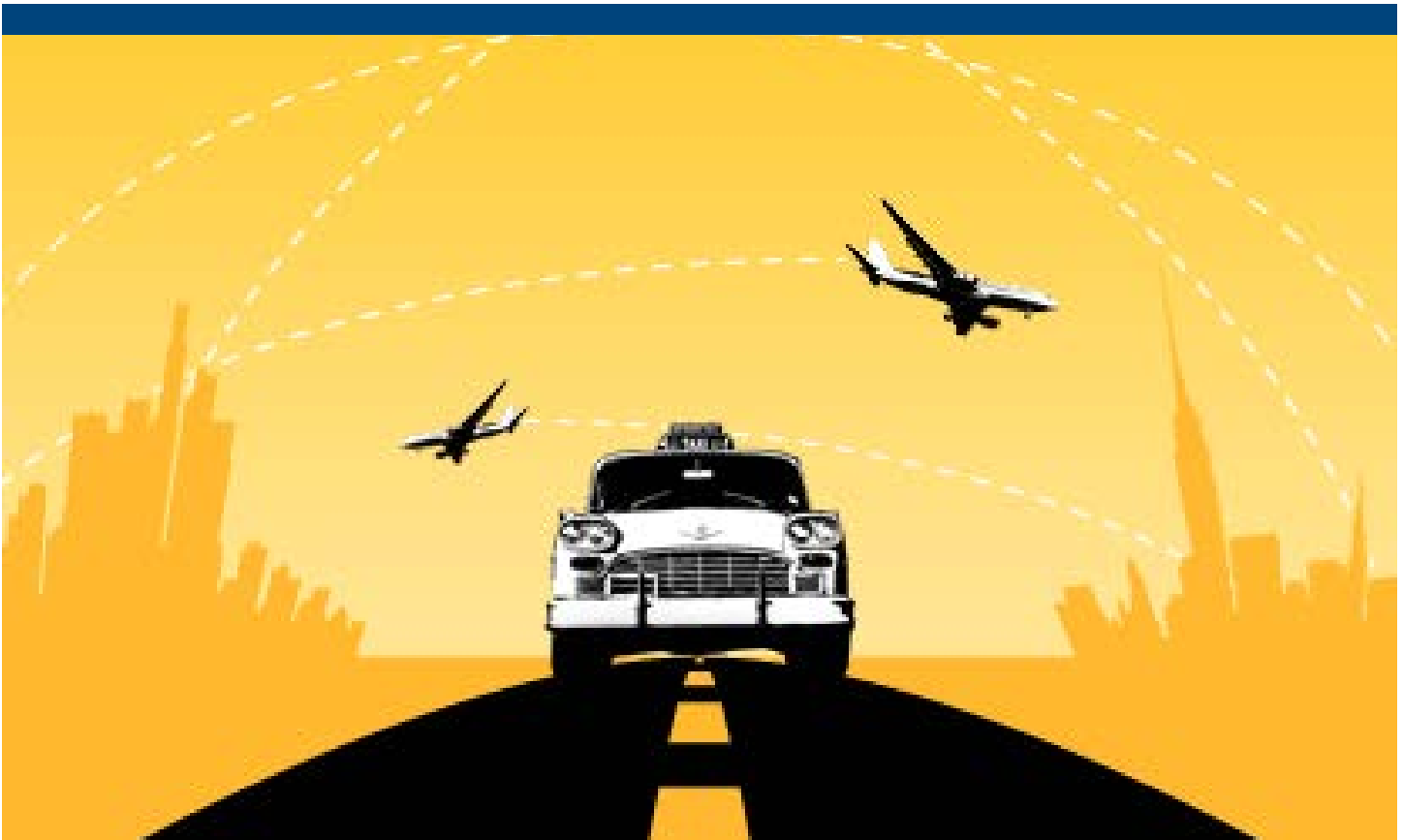
Top Ten of 2014

Top Ten Most Accessed Articles in 2014

by Jury Expert Editorial Staff

Here are the ten articles your colleagues found most intriguing from The Jury Expert website in 2014. Take a look and see if you've read all of them!

- 1) [The Mystery of False Confessions](#): Doug Keene and Rita Handrich on why false confessions happen along with responses from Saul Kasin, Walter Katz, Karen Franklin and Larry Barksdale. This one received almost double the traffic of our second most visited article.
- 2) [What to Wear in Court](#): Merrie Jo Pitera briefly and clearly addresses how what you wear to court communicates a lot about you. She offers recommendations for both male and female parties and witnesses.
- 3) [Avoiding Jury Duty](#): David Sams, Tess M.S. Neal, and Stanley Brodsky wrote this psychological and legal perspective on why people avoid (or try to avoid) jury duty.
- 4) [Police Deception During Interrogation](#): Krista Forrest and William Woody wrote this article on how the police use deception during interrogation and how jurors view confessions when deception is used to elicit them.
- 5) [Guilty but Mentally Ill \(GBMI\) and Not Guilty by Reason of Insanity](#): Jennifer Kutys and Jennifer Esterman penned this annotated bibliography that is a perennial favorite of our readers looking for information on this specialized area.
- 6) [16 Simple Rules for Jury Selection](#): Mark Bennett wrote another perennial favorite for attorneys doing voir dire everywhere.
- 7) [Gen X Members are "Active, Balanced and Happy"](#). Doug Keene and Rita Handrich wrote this update on how far Gen X members have come from their initial portrayal as grungy punks.
- 8) [The Glasses Stereotype, Revisited](#): Michael Forster, Gernot Gerger, and Helmut Leder (all from the University of Vienna) wrote this piece looking at whether the stereotype of eyeglass-wearing criminal defendants being treated less harshly holds water.
- 9) [Ethical Issues in Racial Profiling](#): Annabelle Lever (a British ethicist) examines the idea of racial profiling in the American justice system.
- 10) [Why a Courtroom Full of Reptiles is a Bad Idea](#): Stephanie West Allen, Jeffrey Schwartz, and Diane Wyzga wrote this examination of the reptile theory and Mark Bennett, Sonia Perez Chaisson, Max Kennerly and Randi McGinn offer their reactions to the paper. 🐍



Road Warrior Tips: February 2015

by ASTC Member Trial Consultants

Like many of you, we travel all the time. And we have secrets that help us get around faster, more comfortably and tips on what to make sure and carry with you in the air, on the ground or even, underground! Thanks to the generosity of these frequent flyers—these trial consultant secrets can be yours as well. As we collect additional secrets, we'll add them here (check the Road Warrior category before you head out).

Could not survive travel changes, cancellations, et cetera in this 2015 winter weather without my [Flight Tracker app](#). Remember to be nice to everyone, especially the ticket agents. They have been yelled at all day by others and to receive a kind voice and smile makes their day and helps them to be willing to go out of their way for you. Sugar, never vinegar. *[Submitted by Merrie Jo Pitera of [Litigation Insights](#).]*

Don't want to incur the cost of having the hotel valet press your (now-wrinkled) clothes once you arrive at your destination? Avoid the wrinkles and the fees by packing the “wrinkle-free” way: (1) Create a “base” in your suitcase of soft, rolled items—pajamas, sweaters, undies—then (2) wrap any dress shirts—still folded as they come from the cleaners—inside plastic dry cleaner bags—and place on top to create a second layer. (3)

Keeping your business suits, dresses, or blouses on their plastic (not metal) hangers and in their individual dry cleaning bags, gently fold one item at a time across the top of the two bottom layers. Place any pants on separate hangers and in separate bags, and lay them down first, flat across the shirts. Alternate folding directions (side to side and front to back) so that no two hangers are directly on top of each other. (4) Pack all shoes, toiletries, hairdryers, curling wands, makeup or other relatively heavy or bulky items in a different suitcase, altogether—perhaps a carry-on. (You never know when an unexpected flight delay will make you wish you had a toothbrush or a different pair of shoes within reach.) (5) Once you arrive at your hotel, flip open your suitcase, pull your business wardrobe out by the hangers and hang it right in the closet. The hangers have saved you time, the plastic bags have trapped enough air to keep wrinkles at bay, and you can quickly get on with your day. *[Submitted by Karyn Taylor of [The Strategic Image](#).]*

Here's a terrific list from [Time.com](#) on how to be a smarter traveler in 2015. They include: the best travel rewards credit card, checking the ever-changing rewards policies on your favorite frequent flyer program, being promiscuous when it

comes to major loyalty programs, best days to search for low airfares, and best day to book a ticket! I bet there is at least one on this list that you didn't know! *[Submitted by Rita Handrich of Keene Trial Consulting.]*

At those times when you want to provide a smaller, but memorable tip, use two dollar bills. Two added benefits: Fewer dollars in the wallet and a conversation starter. Note: You may have to make a special request for them at the bank. *[Submitted by Debra Worthington of Auburn University.]*

I found an app called simply “White Noise” which, when coupled with noise cancelling headsets and/or earphones further reduces distractions. The app has many different sounds to pick from so you can find your own favorites. Sometimes the combo of these 2 is enough to block out the dreaded screaming baby on the airplane. Other times, you have to fire up the rock & roll. *[Submitted by David Fauss of Magnus Research and Jury Trial Consulting Services.]* ©



Who Is the Ideal Juror to Look for During Voir Dire?

by Jill Leibold, Ph.D.

As jury consultants, one of the questions we hear most often is, “What kinds of jurors do I want on my jury?” Related to that, we’re frequently asked, “Do I want men or women on my jury?” “Do you think older jurors will be better for me than younger jurors?”

Jury Selection Is Actually De-Selection: Find Your Riskiest Jurors

Because it is so important to identify the riskiest jurors for cause strikes and peremptory challenges, we think of the process as jury de-selection. It is very tempting to want to identify jurors you like for your case – it makes you feel more confident that you’ll have someone on your side in deliberations. It can be pretty difficult to put that urge aside and instead talk with jurors about negative things that put your case at risk. It isn’t always very comfortable. Still, the most important thing to remember is that if you identify jurors favorable to your case, those same jurors are bad for your opponent and you’ve done opposing counsel a big favor by identifying and prioritizing their cause and peremptory strikes.

The better question to ask is: “Which jurors pose the greatest danger to my case?”

Knowing Your Verdict Goal Is a Good Start

In every case, the goals are different. For some cases, your goals are attaining a full defense verdict and zero dollars of damages. In others, liability has been decided and the defense case is focused on reducing damages. Knowing the goal of voir dire is key because relevant questions and risk factors can vary greatly between damages cases and liability cases.

Demographics Are Not Sole Predictors of Juror Verdicts

Unless you are trying a discrimination case or a case directly related to a specific set of demographics, such characteristics in general predict only a small proportion of a juror’s verdict leaning. Every woman is different and has different experiences. Every African American is different and has different experiences. And so on – for every single demographic out there. If that’s the case, what matters? A lot of other important things,

including:

- Attitudes related to your case.
- Attitudes toward jury damage awards.
- Attitudes toward government regulation.
- Personal experiences and those of close others, specifically ones related to your case.
- Feelings of victimization or fatalistic views (i.e., feeling no personal control over one's outcome and at the mercy of the hands of fate).
- Type of job – does the juror work in a helping, service, science or management position? What jurors focus on every day for work can offer insights to their interests, attitudes and experiences.

A Mock Trial or Other Jury Research Can Create a Statistical Juror Profile, Predictive Factors to Identify Riskiest Jurors

Although there are a whole host of great reasons to conduct jury research – honing one's case story and themes being a big one – the data collection that takes place during such research can lead to a statistical profile of the riskiest jurors for a specific case. This statistical profile can inform the development of a Supplemental Juror Questionnaire (SJQ), voir dire questions and a strike/cause profile for use in jury de-selection.

In some cases, this quantitative data collection can be quite powerful, offering a whole host of risk factors to target in voir dire and ultimately jury de-selection. Those distinguishing risk factors vary case to case, but with enough data^[1] for statistical analysis, can have reliability and predictability in a particular

case. In serial cases on the same issue with combined datasets over time, the risk factors and validity of the data solidify and offer long-term guidance on which jurors are dangerous for your client's case.

While a qualitative reviews of deliberations or other juror data can be conducted to determine a jury profile and risk analysis, one can strengthen that analysis by identifying the strongest pro-plaintiff (and often pro-damages) jurors and the most ardent pro-defense jurors, pitting them against each other in statistical analyses that narrow the most important factors via the data. Consultants can then take this valuable information and look at it in its entirety, offering true insight into the constellation of key attitudes and experiences that will identify our greatest risks in jury de-selection.

At times, with a large enough dataset,¹ we are able to run deeper and more complex statistical analyses (i.e., regression models) to not only winnow down the risk factors to just a few, but also use those statistics to develop a Risk Score that can be applied to each juror during voir dire based on their responses to direct questioning.

Conclusion

Jury de-selection is more than just demographics; it is a constellation of demographics, attitudes and juror experiences to develop the most robust juror profile for deselecting the riskiest jurors for your case. ©

With over 11 years of trial consulting experience, Jill Leibold has applied her expertise in juror decision-making to hundreds of cases across all genres of litigation. Clients rely on her skills in preparing challenging witnesses for deposition and trial, and on her extensive experience in jury selection for both civil and criminal cases. She specializes in developing statistically based, juror risk profiles to identify jurors for cause and peremptory strikes, and also applies the qualitative analyses to develop case stories and themes. Jill frequently presents at national legal conferences and writes for legal trade publications about juror attitudes, implicit bias and jury selection in the areas of environmental and toxic torts, personal injury, asbestos, insurance bad faith, patent and trademark, product liability, fraud and criminal cases in her work at [Litigation Insights](#).

[1] To run a regression analysis, the dataset should have 15 respondents per variable entered. So, for a regression with only four predictors, the sample size should be a minimum of 60. The smaller the sample size, the more "noise" the data will bring with it, so the ultimate predictiveness will be lower with the bare minimum sample size as well. More typically, these analyses are conducted on a larger combined sample of multiple mock trials with at least three deliberating juries per mock trial. However, as with anything relating to human behavior, nothing can be calculated to *guarantee* a degree of statistical certainty.

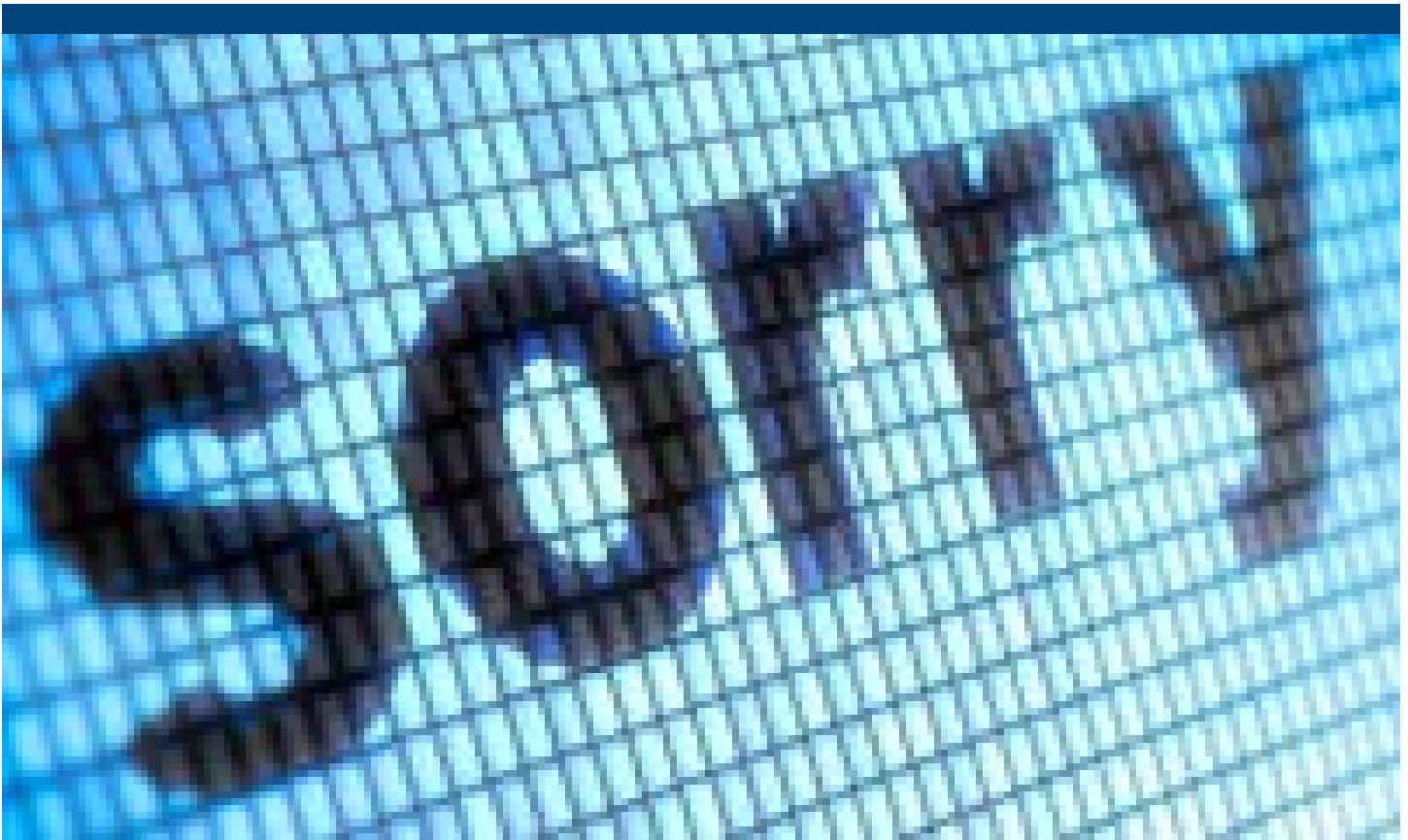
Battle of the
COMMONLY
MISSPELLED
or
MISUSED
WORDS
VS

ACCEPT <i>(verb) to receive</i> I accepted all my birthday gifts with gratitude.	EXCEPT <i>(conjunction) apart from; otherwise than; were it not true</i> When Susan travels, she packs everything except the kitchen sink.
AFFECT <i>(verb) to have an effect on; influence; produce a change in; to stir the emotions</i> The dog's death affected his owners.	EFFECT <i>(noun) anything brought about by a cause or agent; result</i> The new speed limit law had little effect on the speed of the motorists.
A LOT <i>(noun phrase) many</i> "A lot" is always two separate words. "Alot" is not a real word. A lot of people came to the party."	ALLOT <i>(verb) to distribute; give or assign</i> Fifteen minutes were allotted to each of the speakers at the conference.
ALLUSION <i>(noun) an indirect reference</i> The Austin Powers movies often make allusions to the James Bond films.	ILLUSION <i>(noun) a false idea or conception; belief or opinion not in accord with the facts; an unreal, deceptive, or misleading appearance or image</i> The magician created the illusion that he was levitating.
AWHILE <i>(adverb) for a while; for a short time</i> The guests planned to stay awhile .	A WHILE <i>(noun) for a short time; when white is used as the object of the preposition (for a while) then the "a" is separated from the "while"</i> The guests planned to stay for a while .

Favorite Thing for February 2015

by Rita Handrich, Ph.D.

I have never retained the information on the difference between affect and effect. No matter how often it is explained to me, I fail to remember when it matters. So the Favorite Thing for this month is [Visualistan](#)—a website full of infographics. My current favorite is [this one!](#)



“Mea Culpa” in the Courtroom: Apology as a Trial Strategy

by Kevin Bouilly, Ph.D.

Editor Note: You may know that The Jury Expert began to publish online only in May 2008. That meant we left some really good “classic” pieces behind so we have been trying to get them out to you so they do not simply lie unseen in our archives. Here’s one of those ‘classics’ from Kevin Bouilly on apology. Originally published in our April 2007 issue, this one stands the test of time.

IN APRIL OF 2006, notable media mogul Hugh Hefner apologized to Jessica Alba for the unauthorized use of her photo, prompting the actress to halt pending legal action against Playboy magazine. Just a few years earlier a woman paralyzed in an accident associated with faulty tires on a well-known SUV settled her case for about one third of the \$100 million she originally sought. The shift occurred after defense attorneys offered the woman a bedside apology. Similar examples in legal as well as popular news abound, and the legal community has taken notice. Yet, many remain skeptical of apology’s utility, partly because anecdotal evidence like the two stories above have been more available than sound research and evidence supporting apology’s effectiveness, particularly its effectiveness in trial. Can apology really improve trial outcomes?

Listening to mock jurors as well as actual jurors confirms that jurors are familiar with apology and are highly attuned to its many forms. This should come as no surprise. Apologies occur constantly in everyday life, often in the simple form, “I’m sorry.” Recent media attention and empirical research also confirm that apology has a significant role in the legal system and litigators are right to pay attention. A proven strategy for preventing litigation, legal scholars also argue for apology’s increased use in mediation, alternative dispute resolution, and settlement negotiations – and the attention continues to grow.¹

Apology’s benefits can extend to trial as well. Defendants, and especially defendants with demonstrable overt responsibility, may benefit from apologizing at trial for the very same reasons apology prevents litigation in the first place. Apologetic communication can assuage hurt feelings, disarm anger and resentment, and lead to more positive evaluations by third party jurors.² Failure to achieve these effects can equate to real consequences for parties in litigation. However, the questions remain; is apology a viable option in your next case? Is its impact beneficial more often than it is damaging? How can it be successfully incorporated into an effective trial message?

A defendant alleged to have engaged in illegal behavior can employ innumerable strategic communication alternatives during the course of litigation. With regard to the expression of remorse, however, the *effective* choices are simple.

- make no mention of apology or remorse
- express a partial apology
- express a full apology
- express a lack of remorse

Most common are trial communication strategies lacking any mention of remorse or apology, in favor of an assertive defense. Indeed, most cases don't call for apologetic communication in any form. However, the strategic decision to apologize is becoming a more central part of litigation and may be more nuanced than once believed, particularly with regard to the distinction between a partial and full apology.

Social science research clearly defines the components comprising complete or "full" apologies in comparison to less complete

"partial" apologies.² A partial apology generally contains a single element, an expression of remorse, and commonly takes the form of "We're sorry..." An effective partial apology confines remarks to expressions of remorse rather than any expressions of blame, unlike alternative forms which often include excuses or deflective communication that can reduce its sincerity by taking the form of "We're sorry, *but...*" Not surprisingly, jurors are keen to the differences.

A full apology incorporates the first and most critical element, an expression of remorse, accompanied by three additional elements. The second is an admission of responsibility for the relevant action. Then, an offer to repair any damage caused by the action, followed finally by a promise of reform to correct the behavior and prevent similar damage in the future. Research confirms that each of the four elements provides an independent and additive effect, proving the value of a full apology lies in its completeness.² Consider the following shortcut to understanding the components of a full apology.

Element	Exemplary Statement
Remorse	The people of Acme Corporation want Mr. and Mrs. Jones to know they are extremely sorry, and you'll hear them express their remorse in this trial.
Responsibility	Acme Corporation takes full responsibility for what happened.
Repair	We want Mr. and Mrs. Jones to know we are willing to make this situation right and to do whatever we can to remedy the damage they have experienced in this case.
Reform	Acme Corporation has already begun to implement changes in its policies, the supervision of its employees, and its procedures in order to prevent a similar outcome from happening in the future.

A Full Apology: The Four Rs

Jurors appreciate a full apology because it expresses a defendant's willingness to acknowledge wrongdoing and cede power to a victim or third party in exchange for vulnerability. The full apology empowers the victim and/or jurors delegated to sit in judgment. A full apology also responds to the critical relationship between severity of harm, responsibility and apology. As the severity of harm and the amount of responsibility increase, so does the requirement for an elaborate, sincere, and complete apology.

A handful of incomplete apology options are not included as effective litigation alternatives. The classic example of Exxon's "botched" apology is one example of an ineffective apology that jurors easily identify and harshly criticize.³ This failed apology expressed remorse but deflected any responsibility for the consequences that ensued. Such a failed apology has many cousins,

all of which communicate the message that while your client is saying they are sorry for what happened, they don't believe it was their fault, they aren't interested in repairing the damage, they aren't truly interested in fixing the problem, and by the way, they aren't really sorry. This communication is fundamentally different from partial and full apologies because it adds the deflective or excusatory communication that fuels rather than reducing juror anger. Unfortunately, examples of companies and defendants offering these inept apologies are numerous and memorable, highlighting the critical importance of understanding the impact of apology and its effective forms.

The Impact of Apology

Empirical research and experience establish apologetic communication's effects across many social situations. Research proves apology leads to more positive judgments of transgressors and

reduced anger and punishment levied against them.⁴ It works primarily because apology alters the social dynamics and influences how victims and third parties evaluate transgressors and their identities.

However, litigators are most interested in whether or not apology recipients, and jurors in particular, perceive the differences in the various apology forms and how those forms can be maximized for a client's benefit. Jurors do perceive the differences between a trial argument offering an apology and one that does not, and make differing attributions based on the number and nature of components included in apologetic communication.² Recent research finds that compared to defendants offering no apology at all, mock jurors perceive defendants offering a full apology as more sincere, more apologetic, more willing to compensate the plaintiff, more accepting of responsibility, and more willing to correct the situation.⁵

Third party mock jurors perceive defendants offering a full apology as having higher moral character, being more regretful, and taking greater care in the future and have been found to experience reduced anger, greater forgiveness and offer greater sympathy to the defendant.⁶ Full apologies can also lead to greater acceptance of settlement offers.⁶

The news isn't all in favor of a full apology, however. Jurors are also more likely to attribute greater responsibility to a defendant offering a full apology – supporting litigators primary fear that apology increases liability.

Clearly, apology influences jurors' perceptions of a defendant. However, despite the perception that partial apologies have fewer benefits and a greater risk of backfire, a simple "We're sorry" without accepting responsibility, promising forbearance, or offering repair is not necessarily an ineffective alternative for defendants. Full apologies lead to greater perceptions of defendant responsibility *and* partial apologies are generally no worse than offering no apology at all.^{5,6} There is very little support for the conclusion that a partial apology negatively impacts a defendant. Instead, the expression of remorse included in a partial apology may be the most critical component, making partial apology a useful option in the right circumstances.

However, while anecdotes persist there remains little empirical support that apology in any form affects a defendant's bottom line at trial, at least in the form of damage awards. While empirical evidence shows apology can increase perceptions of responsibility and liability, only theory and anecdotal experience support the view that apology can mitigate damages. In one study of corporate negligence, different forms of apology didn't impact any trial outcomes, including attributions of comparative negligence, economic damages, non-economic damages and punitive damages.⁵ Litigators should find this less as a reason to ignore apology and more a reason to consider the effective and strategic use of its specific forms.

Apologizing Is Not a Concession of Liability

Litigators often fear apologizing and admitting *any* responsibility is tantamount to giving up on liability in exchange for a hopeful break at the damages phase. Jury research and practical experience demonstrate jurors don't see it that way. Jurors are willing to more positively evaluate parties that take appropriate responsibility for actions related to the dispute – even if the scope of those actions is more narrow than the behavior directly to legal liability. For instance, once a party has explained how it met its responsibilities in a multi-party contract, jurors are often pleasantly surprised to hear the same party admit responsibility or express remorse for less critical behavior and choices that could have been handled differently.

When narrowed to the appropriate scope, admitting safe responsibility or expressing remorse can occur without admitting liability and pointing out what distinguishes responsibility from liability can be an effective way of gaining credibility without capitulating. It is clear that parties can benefit from owning their behavior and apology is one way of communicating remorse and responsibility, making it a useful communication alternative to consider when evaluating your trial strategy options.

Your Trial Message

Apologetic communication is nuanced and highly dependent on specific human circumstances. While there have been significant strides in the research, there are no hard and fast rules defining exactly how and when litigators should incorporate apology in the course of trial. However, there is overwhelming evidence that refusing to apologize can lead to negative outcomes in the public sphere and in litigation, and that an appropriate apology can lead to some powerful and positive results. Victims desire apologies and jurors are attuned to its various forms, including the idiosyncrasies of insincere, poorly timed, or "botched" apologies. Confidently advise your clients that apology can be an effective strategy by knowing the circumstances that cause victims and jurors to clamor for a particular response, and being mindful of the best possible time to provide that response.


Timing is Critical

First, consider the critical importance of a well-timed apology. In some circumstances, apology *at trial* may be too late to affect a defendant's trial outcome. There is no doubt that timeliness is directly related to an apology's sincerity and jurors may perceive the decision to apologize on the eve of trial as "a settlement tactic, not a sincere expression of regret."⁷ An early and immediate apology can often defuse anger and prevent litigation, a positive benefit of reacting sincerely and immediately in the wake of a transgression. However, there is also some research suggesting an early apology combined with a trial apology can increase damage awards against apologetic defendants in medical malpractice suits.⁸

Jurors' perceptions of defendant behavior are critical. A pattern of repeated apologetic communication for a single incident may give jurors greater certainty of the defendant's overt responsibility and legal liability. A lack of specific apologetic communication leading up to trial may make jurors certain an apology at trial is nothing more than a manipulative strategy. Clearly, timing is critical. Organizations that engage in ongoing public communication find that timely, efficient, and strategic apology can provide restored social status, public forgiveness, and a return to levels of social acceptance enjoyed before the transgression.⁹ It represents an opportunity for the organization to communicate its core values, demonstrate them to the jury-eligible public and manage lasting impressions. In other instances, a specific case may clearly warrant apology as a communication strategy at trial. In those instances, your message depends on additional factors like those discussed below that influence the impact of your apology options in front of a jury.

Utilize Your Options

Consider your potential apology options when the following evidentiary and injury conditions are present.⁶

1. A Partial Apology – Maximize its utility when the strength of the evidence is ambiguous and the injury severity is minor. Mock jurors' and actual jurors' comments confirm the belief that victims and jurors generally require a less complete apology when the injury is less severe. An expression of remorse should not increase attributions of responsibility when injuries are minor and can often serve to influence perceptions of the defendant and improve identity evaluations. Your opening statement or closing argument should incorporate simple language expressing remorse.
2. A Full Apology – Maximize its utility when the strength of the evidence is clear and the injury severity is major. The risk of increasing perceived responsibility with a full apology is reduced because the evidence of responsibility is already strong. Instead, this situation allows you to put the benefits of apology in play without significantly increasing the risks. Recent juror interviews confirm the value of a full and sincere apology in such circumstances. After the wrongful death of a young man, jurors wanted to hear corporate witnesses express remorse and prove they were serious about preventing similar accidents in the future. Victims and jurors want acknowledgement in this scenario, and will likely perceive a partial apology or failed attempt at a full apology as evasive and incomplete.
3. An Assertive Defense Without Apology – Clearly, there are many instances where this approach is warranted. Generally speaking, apology as part of an attorney's trial message remains somewhat rare. Avoiding apology may be critically important when the strength of evidence is ambiguous and the injury severity is major. Substantial damages exposure due to serious harm coupled with an apology that may increase liability is likely to be a scenario you want to avoid. 

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